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No. 01-529

In the Supreme Court of the United States

LARRY HOOVER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for conducting a continuing criminal enterprise in violation of 21 U.S.C. 848 (1994 & Supp. V 1999).

2. Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously that the CCE petitioners derived "substantial income or resources," 21 U.S.C. 848(c)(2)(B), from the specific predicate offenses that they were found to have committed.

3. Whether the district court erred in sentencing the CCE petitioners to mandatory life imprisonment under 21 U.S.C. 848 (1994 & Supp. V 1999), when the facts necessary for imposing a mandatory life sentence were neither alleged in the indictment nor found by the jury.

4. Whether the Chief Judge of the United States District Court for the Northern District of Illinois had authority under 18 U.S.C. 2518(3) to order the interception of oral communications occurring in the Southern District of Illinois.

5. Whether the government provided a "satisfactory explanation" under 18 U.S.C. 2518(8)(a) for a delay in sealing the tape recordings of intercepted communications.

6. Whether the government acted unlawfully in intercepting oral communications without the consent of any participant in the communications.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	6, 8, 9, 11
Hatcher v. *United States*, No. 00-10047 (Oct. 1, 2001)	12
Jackson v. *United States*, 531 U.S. 953 (2000)	12
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	8, 9
Neder v. *United States*, 527 U.S. 1 (1999)	7
Richardson v. *United States*, 526 U.S. 813 (1999)	7
United States v. *Aguayo-Delgado*, 220 F.3d 926 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000)	10
United States v. *Alvarez*, 266 F.3d 587 (6th Cir. 2001)	11
United States v. *Barragan*, 263 F.3d 919 (9th Cir. 2001)	9
United States v. *Escobar-de Jesus*, 187 F.3d 148 (1st Cir. 1999), cert. denied, 120 S. Ct. 1208 (2000)	7
United States v. *Garcia*, 252 F.3d 838 (6th Cir. 2001)	10-11
United States v. *Hitchcock*, 263 F.3d 878 (9th Cir. 2001)	10
United States v. *Jackson*, 207 F.3d 910 (7th Cir.), remanded on other grounds, 121 S. Ct. 376 (2000), decision on remand, 236 F.3d 886 (7th Cir. 2001)	5, 6
United States v. *Keith*, 230 F.3d 784 (5th Cir. 2000), cert. denied, 121 S. Ct. 1163 (2001)	10

Cases—Continued: Page

United States v. *LaFreniere*, 236 F.3d 41 (1st Cir. 2001) 10
United States v. *Long*, 190 F.3d 471 (6th Cir.), cert. denied, 528 U.S. 1032 (1999) 7
United States v. *McIntosh*, 236 F.3d 968 (8th Cir.), cert. denied, 121 S. Ct. 1964 (2001) 10
United States v. *Pratt*, 239 F.3d 640 (4th Cir. 2001) 10
United States v. *Ramirez*, 242 F.3d 348 (6th Cir. 2001) 10, 11
United States v. *Robinson*, 241 F.3d 115 (1st Cir.), cert. denied, 122 S. Ct. 130 (2001) 10
United States v. *Rodgers*, 245 F.3d 961 (7th Cir. 2001), petition for cert. pending, No. 01-5169 (filed July 5, 2001) 10
United States v. *Smith*, 223 F.3d 554 (7th Cir. 2000) 6
United States v. *Stafford*, 258 F.3d 465 (6th Cir. 2001) 10
United States v. *Strayhorn*, 250 F.3d 462 (6th Cir. 2001) 11
United States v. *Williams*, 238 F.3d 871 (7th Cir.), cert. denied, 121 S. Ct. 2232 (2001) 10

Statutes:

18 U.S.C. 924(c) 2
18 U.S.C. 1956(a)(1)(B)(i) 2
18 U.S.C. 2510(4) 5
18 U.S.C. 2518(3) 4, 11
18 U.S.C. 2518(8)(a) 5, 6, 12
21 U.S.C. 841 (1994 & Supp. V 1999) 11
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b) (1994 & Supp. V 1999) 9, 11
21 U.S.C. 841(b)(1)(B) (1994 & Supp. V 1999) 4, 9

Statutes–Continued:

	Page
21 U.S.C. 841(b)(1)(C) (Supp. V 1999)	10
21 U.S.C. 843(b)	2
21 U.S.C. 846	1-2
21 U.S.C. 848 (1994 & Supp. V 1999)	7, 11
21 U.S.C. 848(a)	2, 4, 9
21 U.S.C. 848(b)	4, 8, 9, 11
21 U.S.C. 848(c)	4
21 U.S.C. 848(c)(2)(B)	7
21 U.S.C. 861(a)	2
28 U.S.C. 2518(3)	3, 4, 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 246 F.3d 1054.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2001. The petition for rehearing was denied on May 14, 2001. Pet. App. 32. Justice Stevens extended the time for filing a petition for a writ of certiorari to September 26, 2001. The petition was filed on September 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, each petitioner was convicted of drug conspiracy, in violation of 21 U.S.C.

846. Hoover, Shell, Howard, Strawhorn, and Wilson were also convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); two counts of using minors to further a drug conspiracy, in violation of 21 U.S.C. 861(a); 15 counts of drug possession and distribution, in violation of 21 U.S.C. 841(a)(1); 20 counts of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b); and one count of using a firearm during and in relation to a drug offense, in violation of 18 U.S.C. 924(c). In addition to the conspiracy count, Edwards was convicted on three possession and distribution counts, 19 telephone counts, and one firearm count; and Branch was convicted on two counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). Each of the CCE defendants and Edwards was sentenced to life imprisonment; Bradd was sentenced to 292 months' imprisonment; and Branch was sentenced to 324 months' imprisonment. Apart from vacating Branch's sentence and remanding for resentencing, the court of appeals affirmed. Pet. App. 1-17.

1. Beginning in the early 1970s and for many years thereafter, the Gangster Disciples sold cocaine in Chicago, Illinois, and the surrounding area. The gang used violence when necessary to protect its territory from incursions by rival gangs. The gang also employed minors armed with guns to provide security for gang members.

Hoover was "chairman of the board" of the gang; Shell was Hoover's second in command; and Howard was the third of the gang's "directors." Below them were several "Governors," including Wilson and Strawhorn, each of whom was responsible for supervising the distribution of drugs in a specific geographic area. Governors supervised "Assistant Governors" and

several "Regents," and each Regent oversaw the work of several "coordinators" and "soldiers." Edwards, Bradd, and Branch were "deeply involved" in the activities of the gang. The gang had approximately 6000 members and grossed approximately $100 million annually. Pet. App. 2; Gov't C.A. Br. (Hoover) 2.

2. On October 29, 1993, the Chief Judge of the United States District Court for the Northern District of Illinois entered an order under 28 U.S.C. 2518(3) authorizing the oral interception of communications of Hoover and others occurring at the Vienna Correctional Center. The Vienna correctional center is located in the Southern District of Illinois, but the government planned to listen to the conversations in Chicago, which is in the Northern District of Illinois. On December 3, 1993, the Chief Judge extended the order for 30 days. The government obtained oral interceptions by hiding transmitters in badges worn by Hoover's visitors. The transmitters sent a radio signal to a transceiver located at Vienna. The signal was then redirected to a wire room in Chicago, where government agents listened to and tape recorded the conversations.

On December 19, 1993, the interceptions ceased after one of Hoover's visitors discovered the transmitter in the badge. On January 2, 1994, the extension order expired. On February 4, 1994, the government took the tape recordings of the intercepted conversations to the Chief Judge, who sealed them on that date. On May 6, 1994, after the development of a more sophisticated visitor badge, the Chief Judge entered a second extension order. That order, however, did not result in the interception of any conversations.

Before trial, petitioners moved to suppress the intercepted conversations on the ground that the Chief Judge of the Northern District of Illinois did not have

jurisdiction under 18 U.S.C. 2518(3) to enter an interception order for conversations occurring in the Southern District of Illinois. Petitioners also moved to suppress on the ground that the government had failed to comply with the requirement in 18 U.S.C. 2318(8) that recordings must be sealed promptly after the expiration of the interception order. The district court denied petitioners' motion. Pet. App. 24-31.

3. Under the CCE statute, a defendant engages in a "continuing criminal enterprise" when (1) he commits a drug felony, (2) that crime is part of a "continuing series" of drug violations, (3) the violations are undertaken in concert with five or more other persons, (4) the defendant is an organizer, supervisor or manager, and (5) the defendant obtains substantial income or resources from the violations. 21 U.S.C. 848(c). A person convicted of a CCE offense "shall be sentenced to a term of imprisonment which may be not be less than 20 years and which may be up to life imprisonment," * * * except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment." 21 U.S.C. 848(a). In addition, the statute prescribes a mandatory life sentence if the defendant is a principal administrator, organizer, or leader of the enterprise, and the threshold drug felony involved at least 300 times the quantity of a substance described in 21 U.S.C. 841(b)(1)(B) (1994 & Supp. V 1999), or the enterprise received $10 million in gross receipts from its drug trafficking during any 12-month period. 21 U.S.C. 848(b). In this case, the district court found that the CCE petitioners satisfied the preconditions for a mandatory term of life imprisonment. See Pet. App. 4-5.

4. The court of appeals affirmed in relevant part. Pet. App. 1-17. The court rejected petitioners' contentions that the district court in the Northern District of Illinois lacked authority to authorize the interception of conversations occurring in the Southern District of Illinois and that the government failed to comply with its obligation under 18 U.S.C. 2518(8)(a) to seal the intercepted conversations promptly after the authorization expired. The court observed that the Seventh Circuit had rejected those claims in another case involving the Gangster Disciples, *United States* v. *Jackson*, 207 F.3d 910, 914-918 (7th Cir.), remanded on other grounds, 121 S. Ct. 376 (2000), decision on remand, 236 F.3d 886 (7th Cir. 2001), and that this Court had declined to review the claims in *Jackson*. The court therefore rejected petitioners' contentions on the basis of *stare decisis*. Pet. App. 3.

In *Jackson*, the Seventh Circuit held that the Chief Judge of the United States District Court for the Northern District of Illinois had jurisdiction to authorize the interceptions of the conversations between Hoover and his visitors. 207 F.3d at 914-915. The court observed that 28 U.S.C. 2518(3) provides that a judge may enter an order authorizing the interception of communications "within the territorial jurisdiction of the court in which the judge is sitting." 207 F.3d at 914. The court further observed that 18 U.S.C. 2510(4) defines the word "interception" as the "aural or other acquisition" of the contents of a communication. 207 F.3d at 914. The court explained that the *acquisition* of the communications took place in the Northern District of Illinois, where the agents first listened to the conversations, not in the Southern District of Illinois, where the conversations took place. *Ibid.*

The *Jackson* court also rejected petitioners' claim that the intercepted communications should have been suppressed because the government failed to comply with 18 U.S.C. 2518(8)(a), which requires that tape recordings of intercepted communications must be sealed "[i]mmediately upon the expiration of the period of the order, or extensions thereof" unless the government provides a "satisfactory explanation" for a delay. 207 F.3d 915-918. The court noted that "[t]he recordings of Hoover's intercepted conversations were not sealed until 32 days after the expiration of the [first extension order]," which "was much too long to qualify as an immediate sealing." *Id.* at 915. The court concluded, however, that the government had provided a satisfactory explanation for the delay. The court accepted as satisfactory the government's explanation that it had delayed the sealing because it had anticipated the immediate development of a new microphone following the discovery of the original transmitter in the visitor badge. *Id.* at 918.

Invoking *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the CCE petitioners contended that the district court erred in imposing a mandatory life sentence, because the factors supporting that sentence had not been found by a jury beyond a reasonable doubt. Relying on its earlier decision in *United States* v. *Smith*, 223 F.3d 554 (7th Cir. 2000), the court of appeals held that *Apprendi* does not affect sentencing for CCE "[b]ecause a lawful punishment for *every* CCE conviction is life in prison." Pet. App. 4.

ARGUMENT

1. The CCE petitioners contend (Pet. 25-27) that the district court erred in failing to instruct the jury that it must agree unanimously on which particular drug vio-

lations constituted the "continuing series of violations" required for conducting a continuing criminal enterprise under 21 U.S.C. 848 (1994 & Supp. V 1999). In *Richardson* v. *United States*, 526 U.S. 813 (1999), the Court held that such a special unanimity instruction must be given. In light of *Richardson*, the district court erred in failing to give the instruction. That error, however, was harmless. See *Neder* v. *United States*, 527 U.S. 1, 15 (1999) (the failure to instruct the jury on an element of the offense may be harmless). The jury found each CCE petitioner guilty on 37 counts charging substantive drug offenses that qualified as predicate acts under the CCE statute. Accordingly, the jury necessarily reached unanimous agreement on which predicate acts constituted the "continuing series." Other courts have found *Richardson* error to be harmless in similar circumstances. See, *e.g.*, *United States* v. *Long*, 190 F.3d 471, 476 n.3 (6th Cir.), cert. denied, 528 U.S. 1032 (1999); *United States* v. *Escobar-de Jesus*, 187 F.3d 148, 161-162 (1st Cir. 1999), cert. denied, 120 S. Ct. 1208 (2000).

Petitioners argue further (Pet. 26-27) that, in light of *Richardson*, the district court should have instructed the jury that, in order to convict them of a CCE offense, the jury had to find that they derived "substantial income or resources," 21 U.S.C. 848(c)(2)(B), from the specific predicate offenses that the jury unanimously agreed that they had committed. The Court, however, did not decide that issue in *Richardson*. In any event, any error in failing to give the instruction is harmless. The jury found each CCE petitioner guilty of 37 substantive drug offenses, and the evidence showed that petitioners' criminal enterprise had approximately 6000 employees and netted approximately $100 million annually. Gov't C.A. Br. (Hoover) 2. The jury there-

fore necessarily found that petitioners derived substantial income or resources from the agreed-upon predicate offenses.

2. The CCE petitioners contend (Pet. 27-30) that the life sentences they received on the CCE count violate *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the indictment did not allege, and the jury was not required to find, the facts that are preconditions to the imposition of a mandatory life sentence under 21 U.S.C. 848(b). That contention is incorrect.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. The Court reasoned that such a sentencing scheme "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.* at 87-88.

In *Apprendi* the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Apprendi* did not disturb the Court's holding in *McMillan*. Instead, it simply made clear that the holding is limited "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by

the jury's verdict." *Id.* at 487 n.13. The life sentences received by petitioners are consistent with that limitation. Section 848(a) provides that "[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment." Section 848(b) provides further, however, that "[a]ny person who engages in a continuing criminal enterprise shall be imprisoned for life" if (i) the defendant is a "principal administrator" of the enterprise, and (ii) a predicate drug violation involves at least 300 times the quantity of substance described in 21 U.S.C. 841(b)(1)(B) (1994 & Supp. V 1999), or the enterprise received $10 million in gross receipts in any year from drug trafficking.

Because Section 848(a) prescribes a statutory maximum sentence of life imprisonment for *any* CCE violation, subsection (b)'s requirement that the court impose a mandatory life sentence in certain circumstances does not "involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. Instead, "it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *McMillan*, 477 U.S. at 88.

Since *Apprendi*, the courts of appeals have repeatedly affirmed sentences imposed under the mandatory minimum sentencing provisions of 21 U.S.C. 841(b) (1994 & Supp. V 1999) based on a finding by the district court that triggered the minimum sentence, where the sentence imposed did not exceed the maximum authorized by statute given the findings made by the jury beyond a reasonable doubt. See, *e.g.*, *United States* v. *Barragan*, 263 F.3d 919, 925 (9th Cir. 2001) (term of

supervised release); *United States* v. *Hitchcock*, 263 F.3d 878, 886-887 (9th Cir. 2001); *United States* v. *Rodgers*, 245 F.3d 961, 965-968 (7th Cir. 2001), petition for cert. pending, No. 01-5169 (filed July 5, 2001); *United States* v. *Robinson*, 241 F.3d 115, 122 (1st Cir.), cert. denied, 122 S. Ct. 130 (2001); *United States* v. *Pratt*, 239 F.3d 640, 646-648 (4th Cir. 2001) (term of supervised release); *United States* v. *Williams*, 238 F.3d 871, 877 (7th Cir.), cert. denied, 121 S. Ct. 2232 (2001) (No. 00-9667); *United States* v. *McIntosh*, 236 F.3d 968, 976 (8th Cir.), cert. denied, 121 S. Ct. 1964 (2001) (No. 00-1551); *United States* v. *LaFreniere*, 236 F.3d 41, 49-50 (1st Cir. 2001); *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000), cert. denied, 121 S. Ct. 1163 (2001) (No. 00-8077); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 933-934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) (No. 00-6746).

The Sixth Circuit has taken a different approach in reviewing sentences imposed under Section 841(b). In *United States* v. *Ramirez*, 242 F.3d 348, 351-352 (6th Cir. 2001), that court vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A) and remanded for resentencing, even though the original sentence did not exceed the maximum of 30 years authorized by Section 841(b)(1)(C) for a recidivist defendant. 21 U.S.C. 841(b)(1)(C) (Supp. V 1999). Post-*Ramirez* decisions of the Sixth Circuit make clear, however, that the court recognizes the continuing authority of *McMillan* in cases—such as this one—in which a factor limits the court's sentencing discretion within the range otherwise available, without altering the maximum available penalty or creating a separate offense. See *United States* v. *Stafford*, 258 F.3d 465, 478-479 & n.9 (6th Cir. 2001) (noting limitations of *Ramirez* line of cases); *United States* v.

Garcia, 252 F.3d 838, 842-844 (6th Cir. 2001) ("*Apprendi* explicitly applies only in those situations where a factual determination made under a lesser standard of proof than the reasonable doubt standard 'increases the penalty for a crime beyond the [prescribed] statutory maximum.'") (quoting *Apprendi*, 530 U.S. at 490, and distinguishing *Ramirez*); *United States* v. *Strayhorn*, 250 F.3d 462, 470 (6th Cir. 2001).

Thus, although *Ramirez* contains broad language that could be read to apply to a statute such as Section 848(b), see 242 F.3d at 351 ("Aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved."), the holding of the case has been limited to the context of the laddered penalty provisions of Section 841(b). Under that provision, a drug-quantity determination made by the district court can be seen as simultaneously raising both the statutory minimum and the theoretical statutory maximum sentence for a particular defendant. Because Section 848, unlike Section 841, does not set forth graduated *maximum* penalties, but instead authorizes a life sentence for any offense, nothing in the decision below contradicts that holding, or implicates the narrow circuit conflict created by the *Ramirez* line of cases. Compare *United States* v. *Alvarez*, 266 F.3d 587 (6th Cir. 2001) (despite *Ramirez*, *Apprendi* is "inapplicable" where "the statutory penalties available * * * include imprisonment for life").

3. Petitioners contend that the intercepted conversations should have been suppressed because the Chief Judge of the United States District Court for the Northern District of Illinois lacked authority under 18

U.S.C. 2518(3) to order the interception of oral communications occurring in the Southern District of Illinois (Pet. 9-12), and because the government did not provide a "satisfactory explanation" under 18 U.S.C. 2518(8)(a) for its delay in sealing the tape recordings of the intercepted conversations (Pet. 12-20). The Court has twice declined to review the same arguments on the same facts. *Hatcher* v. *United States*, No. 00-10047 (Oct. 1, 2001); *Jackson* v. *United States*, 531 U.S. 953 (2000). We therefore waive our right to respond unless requested to do so by this Court. Petitioners also contend (Pet. 20-24) that the interceptions were unlawful because the participants did not consent to the interception of their conversations. Because that contention manifestly does not present an issue that warrants this Court's review, the government waives its right to respond unless requested to do so by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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